REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 3087/2021
REPORTABLE: ~~YES~~/NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED
Date: 15.08.2023

In the matter between:

IDEAL TRADING 199 CC **APPLICANT**

And

POLOKWANE LOCAL MUNICIPALITY **RESPONDENT**

JUDGMENT

BRESLER AJ

Introduction

[1] This matter was originally brought before Court as an urgent application for the restoration of the Applicant's electricity supply. The application was however removed prior to the hearing thereof as the electricity supply was restored. This rendered the hearing of the application on the urgent roll moot, save for the issue of costs.

[2] Of particular importance in this matter is the timeline within which the parties exchanged correspondence and further affidavits. Having regard to the documents filed on record, the following is evident:

2.1 The Applicant delivered a letter to the Respondent on 5 May 2021 demanding the restoration of the electricity supply. It stands to be noted that the Respondent was pertinently informed that a reply was required by close of business on the 6th of May 2021, failing which the Applicant will approach the Court for relief.

2.2 Having received no response to its letter, the Applicant therefore approached the Court by means of an urgent application issued on the 7th of May 2021.

2.3 The urgent application was served on the Respondent via e-mail at 11:35am on the 7th of May 2021 and via the Sheriff at 12:26pm on the same day.

2.4 The Respondent restored the electricity supply at approximately 14:00pm on the 7th of May 2021. It is common cause that the electricity was only restored after service of the application.

2.5 On the 10th of May 2021, the Respondent delivered its Notice of Intention to Oppose the proceedings.

2.6 Notwithstanding the restoration of the electricity supply, evidently rendering the application moot, the Applicant only elected to inform the Respondent's attorneys on the 12th of May 2021 that they intend to remove the matter from the urgent roll by means of notice.

2.7 On the 13th of May 2021 at 8:58am the Applicant delivered its Notice of Removal.

2.8 The Respondent in return delivered its Opposing affidavit on the same day at 9:35am.

Analysis of applicable law

[3] At the time of the hearing of the argument on costs, the application was neither dismissed nor withdrawn. In my view a determination on the issue of costs is not necessarily dependent on a finding in respect of the merits. Especially where the parties are *ad idem* that the relief claimed by the Applicant became moot even before the Answering affidavit was delivered and as a direct result of the conduct of the Respondent.

[4] In the matter of ***A v B and C***[1] the court stated the following:

> *"When litigation has been commenced or instituted, the question of costs is an issue before the Court and both litigants are entitled to have that issue determined by a judgment. This right is not dependent upon a judgment on the merits of the action. The question of costs can be distinct from that of a judgment on the merits of the case. Thus, a notice of withdrawal does not automatically end the litigation, and if a defendant or respondent does not ask the Court for an opportunity of establishing the right to judgment on the merits, the Court may nevertheless grant a judgment for costs only."*

[5] This court is therefore satisfied that a judgment on the costs will bring about a finalization of the matter as a whole.

[6] The purpose of an award of costs is to indemnify a successful party who has incurred expenses in instituting or defending an action.[2] It is trite law that the general rule is that a successful party is entitled to its costs.

[7] In ***Ward v Sulzer***[3] the Court remarked the following:

---

[1] 1976 (4) SA 31 (R).
[2] Erasmus, *Superior Court Practice*, Volume 2 on page D5 – 1.
[3] 1973 (3) SA 701 (A) at 706G.

"In awarding costs the court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides."

[8] The learned Judge furthermore stated at 133:

"It is not difficult to envisage a situation where, for instance, an applicant which has acted reasonably in launching an application is driven to withdraw it in order to save costs because facts emerging for the first time from a respondent's answering affidavit or because the relief originally sought is no longer necessary or attainable because of developments occurring after the application has already been launched. It would be neither fair nor logical, in my view, to exclude such an application from the protection afforded by s 32(2) and thereby to oblige an applicant, seeking to reply on the provisions of s 32(2), to continue with an application which it has now ascertained to be futile merely in order to retain the protection of the section."

[9] Although this case was decided against the backdrop of a withdrawal, the reasoning still rings true. The Applicant cannot be deprived of its costs in as far as the conduct of the Respondent rendered the merits of the application moot.

[10] In exercising its discretion the court must have consideration to the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstances which may have a bearing on the issue of costs.[4]

[11] The Applicant addressed a letter to the Respondent warning them of the imminent application should they fail to restore the electricity supply. The Respondent failed to timeously observe the demand.

[12] The Respondent raised the issue that the electricity supply was not reconnected due to service of the application, but rather because of negotiations concluded between the Respondent and the Landlord (LEDA). Hence, they argue, LEDA should have

[4] Erasmus, *Superior Court Practice*, Volume 2 on page D5 – 1.

communicated with the Applicant. I find it unreasonable of the Respondent, who caused the termination of the electricity supply to begin with, to blame the lack of communication on a third party.

Ultimately, the correspondence from the Applicant was addressed to the Respondent and was ignored by the Respondent at its own peril. Had the Respondent replied by disclosing the negotiations with LEDA, these proceedings may well have been avoided.

[13] It is evident that the conduct of the Respondent, or rather the lack of reaction, enticed the Applicant to institute the application. The Applicant should therefore be entitled to its costs. This Court therefore finds that the Applicant was substantially successful in its application.

[14] In considering the timeline alluded to herein before, the Respondent could not be faulted for filing its Notice to Oppose. Counsel for the Applicant correctly, in my view, conceded that the filing of the Notice to Oppose was warranted as the Applicant did not immediately remove the matter from the roll when the merits became moot. As such, the Applicant should not be entitled to the costs pertaining to the Notice to Oppose.

[15] The continuance of the matter after the merits became moot, can also not be faulted to either party. It is evident from the record that the Applicant demanded its costs to be paid, whilst the Respondent was adamant that the application should be withdrawn, and that the Applicant should tender the Respondent's costs. The issue of costs was therefore in dispute from the onset.

[16] Counsel for the Respondent submitted in court that the matter should have been resolved by an agreement that each party pays its own costs. This was however not the version expressed by the Respondent in their correspondence and the dispute with regards to costs remained alive and had to be determined by the Court.

[17] The further actions by both the Applicant and the Respondent to enroll the matter on the opposed roll was therefore necessary in order to obtain a final determination hereof.

[18] As already indicated herein before, this Court finds that the Applicant is substantially successful in its application and consequently should not be disallowed any costs (save for the Notice to Oppose) necessitated to have this matter finally determined on the opposed roll.

Punitive costs

[19] The Applicant applied for costs to be granted on a punitive scale as between attorney and client against the Respondent. The Applicant submitted that the conduct of the Respondent has increased the costs exponentially and as such it warrants the censure of the Court.

[20] The Court ordinarily grants an order on attorney and client scale to mark its disapproval of the conduct of the losing party. Much has been said with regards to punitive costs – it is apposite to note that by nature it represents a penalty for reprehensible conduct that exceeds the norm of what is expected of a reasonable litigant under the circumstances. It is therefore normally considered where conduct was *inter alia* malicious, vexatious or fraudulent.

[21] Given the enormous and growing debt burden of municipalities, tight control of credit and effective debt collection are essential components of sustainable service delivery.

[22] The Constitutional Court has expressed this by stating that it is "imperative for municipalities to do everything reasonable to reduce the amounts owing" and that "municipalities bear an important constitutional obligation and a statutory responsibility to take appropriate steps to ensure the efficient recovery of debt".[5]

[23] Termination of services is consequently not an unknown phenomenon and similar cases are regularly heard by the various divisions of the High Court.

---

[5] ***Mkontwana v Nelson Mandela Metropolitan Municipality*** 2005 (2) BCLR 150 (CC) at paras 62 and 124.

[24] The Applicant submitted that it was a consumer in terms of the Electricity Supply By-Law, and it was not in arrears. The Respondent was therefore not entitled to terminate its supply. The Respondent, in return, submitted that it retained the right to discontinue the supply as the owner of the property was in arrears.

[25] Having regard to the constitutional duty of a municipality referred to herein above, the Court cannot conclude that the Respondent's conduct warrants a punitive cost order. It was not malicious, vexatious, fraudulent or of such a reprehensible nature that it warrants a reprimand from the Court. Moreover, the legal representatives of the Respondent did not unnecessarily increase litigation by their conduct as this matter needed to be prosecuted to finality.

[26] The Court is furthermore mindful that any cost order will ultimately affect taxpayers. The potential prejudice to which taxpayers would suffer if punitive cost orders are granted against public entities in the *bona fide* performance of their administrative and executive functions must thus be avoided as far as possible.

Order

[27] In the result, the following order is made:

27.1. The Respondent is ordered to pay the costs of the Applicant on party and party scale excluding the costs pertaining to the delivery of the Notice to Oppose.

27.2 The Applicant is ordered to pay the costs of the Respondent on party and party scale in respect of the Notice to Oppose only.

M BRESLER
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 16h00pm on 15 August 2023.

APPEARANCES

Heard on	**:**	**26 July 2023**
Judgment delivered on	**:**	**15 August 2023**
For the Applicant	**:**	**Adv L van Gass**
Instructed by	**:**	**Nelis Britz Attorneys**
	:	**litigation1@britzlaw.co.za**
For the Respondent	**:**	**Adv LC Nemakula**
Instructed by	**:**	**Kgatla Incorporated**
	:	**info@kgatlainc.co.za**